Supreme Court, U.S.
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No. 85-2143

In The
Supreme Court of the United States
October Term, 1986

RAY A. C. JOHNSON,
Petitioner,

v.

CHUCK R. PATTESON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether the respondent was impermissibly terminated because of his exercise of constitutionally protected First Amendment rights in light of his truthfully answering a question by a Nebraska state senator at a legislative committee hearing?

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STATEMENT OF THE CASE

In regard to the nature of the case, the course of proceedings and disposition below, petitioners statement of the case is substantially accurate.

As to the statement of facts, however, petitioner's statement of the case leaves much to be desired. The relevant facts of this case which bear directly upon the sole issue presented for review as found by the lower court in *Patteson v. Johnson*, 721 F.2d 228 (8th Cir. 1983), are set out as follows:

> Patteson, a certified public accountant, began working in the Nebraska State Auditor's Office in 1975. The following year Johnson promoted Patteson to Deputy Auditor. The Deputy Auditor ranks next to the State Auditor and in his absence may act in his place.
>
> Sometime in 1978 or 1979, the Auditor's Office, under Johnson's direction, began following the American Institute of Certified Public Accounts' Generally Accepted Auditing Standards (CPA Standards). The Auditor's Office also began following the General Accounting Office's Auditing Standards (GAO Standards), and started issuing opinions with every audit. In addition, Johnson developed his own internal auditing standards. Johnson instructed his staff to follow all of these standards. [2] [Footnote 2 states: Johnson told his staff that failure to follow these standards would subject them to discipline.]
>
> On September 18, 1980, the Auditor's Office issued an audit on the operations of the Governor's Office from 1977 to 1980. The audit did not contain an opinion section, and for this reason failed to comply with the CPA Standards, the GAO Standards, or Johnson's own standards. [3] [Footnote 3 states: At

trial Johnson testified that this had been the first audit issued without an opinion since his office had adopted the new standards two years earlier. Neither Patteson nor the audit supervisor signed the audit, although both customarily did so. In addition, the audit did not contain the auditors' notes to the financial statements.] Several months later, in a March 1, 1981 story headlined, "Audit of Governor's Office Lacks Usual Endorsements," the Lincoln Sunday Journal and Star published an article asserting that the audit departed from the recently adopted accounting standards. The article noted that the audit "fails to discuss issues of potential embarrassment to Governor Charles Thone despite the fact that Johnson's staff members raised them during their audit." The article also noted that Thone and Johnson are both Republicans. Patteson, who was by this time a Republican candidate for State Treasurer, declined comment to the press.

Four days later, Patteson and Johnson, who also was a certified public accountant, attended a state senate committee hearing to testify on proposed legislation that would require the State Auditor to be a certified public accountant. Patteson appeared at the hearing at the invitation of the legislative committee of the Nebraska Society of Certified Public Accountants, which was supporting the legislation. As the hearing proceeded, it became apparent that the senators were going to inquire about the audit of the Governor's Office (Governor's Audit). At this point Johnson left the hearing, but did not ask Patteson to leave, and in fact did not give him any instructions.

Patteson remained at the hearing and testified in favor of the proposed legislation. In the course of his testimony, the legislators asked questions about the Governor's Audit. In response to a question from Senator Chambers inquiring why Patteson had not

> signed the Governor's Audit, Patteson stated, "In my opinion the audit did not disclose everything it needed to disclose in order for me to sign it." After that Patteson avoided direct answers to Senator Chambers' questions that pressed for additional information about the audit.
>
> *Id.* at 721 F.2d 229-30.
>
> . . .
>
> Additionally, the district court may have taken some of Patteson's comments out of context and interpreted them incorrectly. The court found that Patteson disrupted operations in the Auditor's Office by indicating in his testimony his ambition for Johnson's job and his competency as a certified public accountant to perform it. The evidence does not support that finding.
>
> . . .
>
> Nothing in the record indicates that this statement was an affront to Johnson . . .
>
> *Id.* at 721 F.2d 231-2, n. 4.

In addition, the following evidence, which is nowhere mentioned in the petition for certiorari, was adduced at trial:

> QUESTION: Now, I'd have you refer to page 19 of your deposition. On Line 2. Question: Okay. Mr. Johnson, during the entire time that Mr. Patteson worked for you as State Auditor did you consider him a faithful, conscientious and competent employee?
>
> ANSWER: Yes.
>
> QUESTION: During the entire time he worked for you did you consider him to be trustworthy and loyal?
>
> ANSWER: Yes.

QUESTION: During the entire time that he worked for you did he cause any disharmony or disrupt the operations in your office or with other employees?

ANSWER: Not that I'm aware of.

QUESTION: During the entire time that he worked for you did he violate, did he ever violate any directives or orders that you gave him?

ANSWER: Not that I'm aware of.

QUESTION: In your deposition were you asked those questions and did you give those answers?

ANSWER: Yes.

QUESTION: And are you intending to the court by your testimony on direct examination to change that testimony?

ANSWER: No.

QUESTION: And do you understand what the words entire time mean?

ANSWER: I believe that I do.

(R 42 & 216)

SUMMARY OF THE ARGUMENT

Respondent Patteson submits that this case was properly decided and does not merit review by this Court. The Eighth Circuit's decision is not in conflict with decisions of other federal courts of appeal or with any decision of this Court.

No other valid reason under Rule 17 exists for review and the petition for certiorari should be denied.

ARGUMENT AND REASONS FOR DENYING THE WRIT

I. The Eighth Circuit's Decision Is Not In Direct Conflict With The Decision Of The Third Circuit Court Of Appeals In Sprague v. Fitzpatrick, 546 F.2d 560 (3rd Cir. 1976), Cert. Denied, 431 U.S. 937 (1977).

First, the continued viability of *Sprague* is questionable in light of the fact that it was decided prior to *Connick*.

Secondly, *Sprague* is clearly distinguishable from the case at bar. In *Sprague*, the employee directly " . . . declared in public that his immediate superior had not told the truth." *Id.* at 546 F.2d 565. Respondent Patteson made no such declaration:

> In response to a question from Senator Chambers inquiring why Patteson had not signed the Governor's Audit, Patteson stated, "In my opinion the audit did not disclose everything it needed to disclose in order for me to sign it." After that Patterson avoided direct answers to Senator Chambers' questions that pressed for additional information about the audit.
>
> *Id.* at 721 F.2d 228, 230.

Respondent Patteson simply gave a general opinion at a legislative committee hearing when asked a direct question by a Nebraska state senator. As stated in *Pickering, supra,* the simple stating of a general opinion "cannot reasonably be regarded as *per se* detrimental" to the employer. *Id.* at 391 U.S. 563, 88 S.Ct. 1731 at 1736.

In addition, the employee in *Sprague, supra,* affirmatively set out to inform the general public of what he

thought was the untruthfulness of his employer's earlier public statements, by granting a reporter an interview and sharply disputing the truthfulness of each of his employer's prior public statements. The Respondent Patteson, in the case at bar, did no such thing. When initially asked by reporters to comment upon the Governor's Audit, Patteson declined to comment. (R, Exhibit No. 4 of Exhibit 1) Respondent Patteson did not deliberately set out to do anything. He was testifying at a legislative committee hearing, on a bill relating to the State Auditor's Office. The Petitioner Johnson was at this hearing with Patteson, knew that questions were going to be asked on the Governor's Audit, and unlike the employer in *Sprague,* certainly had an opportunity to discuss the matter with Patteson, or order him not to testify at the hearing.

The Third Circuit's decision in *Sprague* is not in conflict with the case at bar and should not provide a basis for granting a writ of certiorari.

II. The Decision Of The Eighth Circuit In This Case Is Not Contrary To This Court's Decision In Connick v. Meyers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 703 (1983), and Pickering v. Board Of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L. Ed.2d 811 (1968).

A careful reading of the Eighth Circuit's opinion clearly indicates that the principals of *Pickering* and *Connick* were applied and followed.

The Petitioner Johnson's primary point of contention as to why *Pickering* was somehow not followed, ap-

parently relates to an alleged disruptive factor on the Auditor's Office.

The Eighth Circuit found as a factual matter that the "evidence does not support" a finding that the office operations were disrupted and that "nothing in the record indicates that this statement was an affront to Johnson." *Id.* at 721 F.2d 228 at 231, n. 4.

In addition, Petitioner Johnson himself admitted at trial that he considered Patteson a faithful, conscientious and competent employee, that Patterson was trustworthy and loyal, and that Patterson did not cause disharmony or disrupt the operations of the Auditor's Office. (R 42 & 216)

In regard to *Connick,* Petitioner Johnson properly indicates that the state's burden in justifying a particular discharge varies depending upon the nature of the employer's expression. The Eighth Circuit found that Respondent Patteson's expression related to "a matter of substantial public concern." *Id.* at 721 F.2d 228 at 233. As further stated:

> Moreover, Patteson made the statement in response to a question by Senator Chambers, and nothing in this record indicates his testimony was other than truthful.
>
> *Id.* at 721 F.2d 228 at 233.

Petitioner Johnson himself admitted the same at trial. (R 210)

Respondent Patteson submits within the context of this case, i.e., the admitted failure to follow the adopted

auditing standards, that "the government's interest in the effective and efficient fulfillment of its responsibilities *to the public*" factor actually weighs in his favor.

Pickering and *Connick* are not in conflict with the Eighth Circuit's decision in this case and the petition for certiorari should be denied.

CONCLUSION

For these various reasons, Respondent Patteson submits the petition for certiorari should be denied.

Respectfully submitted,

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